Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

NO. 73-6033

SHARON ROE AND DOROTHY POE, on behalf of themselves and others similarly situated,

APPELLANTS,

V.

NICHOLAS NORTON, individually, as Commissioner of Welfare of the State of Connecticut, and on behalf of others similarly situated,

APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF CONNECTICUT

SUPPLEMENTAL BRIEF OF APPELLEE

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STATEMENT

On February 25, 1975, this Court directed the parties to submit briefs as to whether either this Court or the District Court should reach the merits of the constitutional issues presented by the Appellants and further directed the parties to present their arguments in light of Younger v. Harris, 401 U.S. 37 (1971).

For reasons as will appear hereinafter, the Appellee-Norton urges this Court to reach and decide the merits of the Appellants' constitutional attack on Connecticut's statute, Section 52-440b of the General Statutes of Connecticut.[1].

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1. It is the understanding of the Appellee's counsel that all parties in the instant action urge this Court to reach and decide the merits of the constitutional issues claimed by the Appellants. The absence of a disagreement between the parties on this point would seem to have some significance to this Court. See, e.g. Sosna v. State of Iowa, 43 U.S.L.W. 4125,4126 and n.3 (1975).

ARGUMENT

I. THE FACTS OF THE INSTANT ACTION COMPELS THAT THE INSTANT ACTION BE NOT REMANDED WITHOUT THIS COURT DECIDING THE MERITS OF THE CONSTITUTIONAL ISSUES.

It is to be recalled that the named Appellants (plaintiffs) failed to raise any of their constitutional claims in the proceedings in the Connecticut Circuit Court.[2]. After instituting the instant action in the District Court,[3]. the named Appellants sought in the Connecticut Circuit Court and were granted by that Court a stay of proceedings pending the instant action. Faced with no constitutional claims before it, the Connecticut Circuit Court focused its attention on the District Court's concern for the extraordinary circumstances surrounding the welfare of the class of children certified in the instant action and on the constitutional issues presented to the District Court. In view of these circumstances, inter alia, the Connecticut Circuit Court exercised its discretion by granting the stay of proceedings.[4].

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2. Connecticut Public Act 74-183 (1974), effective December 31, 1974, consolidated what had been the Connecticut Circuit Court into the Connecticut Court of Common Pleas. The petitions under the statute at issue, Section 52-440b of the General Statutes of Connecticut, are now brought to the Connecticut Court of Common Pleas.

   The Appellee has always maintained that the proceedings under the statute at issue are civil.

3. The Appellants relied on 42 U.S.C. Section 1983 for a cause of action. Doe v. Norton, 365 F.Supp. 65,68 (1973).

4. The Appellants and the counsel for the class of children certified in the instant action have presented no evidence whatsoever which would show that the Connecticut Circuit Court shirked or avoided its duty with respect to deciding the merits of the constitutional issues presented in the instant action as claimed by the Appellants and by the counsel for the children on February 25, 1975 in oral argument before this Court.

Having some background as to what transpired in the Connecticut Circuit Court, the Appellee proceeds to discuss Younger against such a background. In Younger, supra at 40, the Court stated that a federal court should not issue an injunction to stay proceedings in a state court in violation of a long standing judicial policy and of 28 U.S.C. Section 2283, which provides:

> "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

The Court in Mitchum v. Foster, 407 U.S. 225 at 242-43 (1971) discusses at some length Younger. The Court in Mitchum, after discussing the history of 42 U.S.C. Section 1983, concluded that Section 1983 did fall within the "expressly authorized" exception of Section 1983. This in effect means that in a Section 1983 action, the anti-injunction statute does not absolutely prohibit in such an action a federal court from issuing a federal injunction in a pending state court proceeding. Id. at 243. Even so holding, the Court in Mitchum made it plain that aside from the anti-injunction statute the principles of equity, comity, and federalism, on which the long standing judicial policy discussed in Younger is based upon, are still applicable when a federal court is asked to enjoin a state court proceeding. Id. It is in this context that the Court in

Mitchum discusses Younger as follows:

> ". . . in Younger v. Harris, 401 U.S. 37, and its companion cases, the Court dealt at length with the subject of federal judicial intervention in pending state criminal prosecutions. In Younger a three-judge federal district court in a Section 1983 action had enjoined a criminal prosecution pending in a California court. In asking us to reverse that judgment, the appellant argued that the injunction was in violation of the federal anti-injunction statute. 401 U.S., at 40. But the Court carefully eschewed any reliance on the statute in reversing the judgment, basing its decision instead upon what the Court called 'Our Federalism' --- upon 'the national policy forbidding federal courts to stay or enjoin pending state court proceedings except under special circumstances.' 401 U.S., at 41,44.
>
> In Younger, this Court emphatically reaffirmed 'the fundamental policy against federal interference with state criminal prosecutions.' 401 U.S., at 46. It made clear that even 'the possible unconstitutionality of a statute "on its face" does not in itself justify an injunction against good faith attempts to enforce it.' 401 U.S., at 54. At the same time, however, the Court clearly left room for federal injunctive intervention in a pending state court prosecution in certain exceptional circumstances --- where irreparable injury is 'both great and immediate,' 401 U.S., at 46, where the state law is"flagrantly and patently violative of express constitutional prohibitions,"' 401 U.S. at 53, or where there is a showing of 'bad faith, harassment, or . . . other unusual circumstances that would call for equitable relief.' 401 U.S., at 54. . . ." 407 U.S. at 229,243. Footnote omitted.

In Mitchum, part of Mr. Chief Justice Burger's concurring opinion notes that the Court has not yet reached or decided exactly how much of a restraint is imposed by the principles of equity, comity, and federalism on a federal court asked to enjoin state civil proceedings. 407 U.S. at 244.

After noting the three statutory exceptions in 28 U.S.C. Section 2283, the Court in Younger noted in addition a judicial exception to the long standing policy evidenced by the anti-injunction statute, to wit: "where a person about to be prosecuted in a state court can show that he will, if the proceeding in the state court is not enjoined, suffer irreparable damages." Younger v. Harris, supra at 43. Citation and Footnote omitted. This judicial exception requires that the prosecuted person has no adequate remedy at law. Id. at 43. In addition, the irreparable injury is insufficient unless it is 'both great and immediate'. Id. at 46. In further discussing the prerequisites of bad faith and harassment often associated with irreparable injury, the Court in Younger stated the following:

> "There may, of course, be extraordinary circumstances in which the necessary irreparable injury can be shown even in the absence of the usual prerequisites of bad faith and harassment." 401 U.S. 53.

The judicial exception to the long standing public policy against federal courts interfering with state court proceedings discussed in Younger applies in the instant action. The extraordinary circumstances in which irreparable injury, both great and immediate, has been suffered and/or will be suffered by the class of children certified in the instant action not only warranted the District Court in reaching and deciding the merits of the constitutional issues in the instant action, but

demands that this Court should reach and decide the merits of the constitutional issues as well.[5] This is not to say that the State of Connecticut, including the Appellee-Norton, has not suffered or will not suffer irreparable injury, both great and immediate, under such extraordinary circumstances surrounding the class of children in the instant action. Often the rights, interests and obligations of the State are fused with the rights, interests, and obligations of children. For example, this fusion would exist in the right of the State to establish paternity of an illegitimate child and to pursue support on behalf of such child from its putative father.[6]

The concern of the District Court for the extraordinary circumstances in which irreparable injury has been suffered and/or will be suffered by the class of children certified in the instant action is expressed by the District Court throughout its ruling on the application for a preliminary injunction, Doe v. Norton, 356 F. Supp. 202 (D. Conn. 1973), and throughout its memorandum of decision, Doe v. Norton, 365 F. Supp. 65

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5. Although the class of children in the instant action are represented by their own counsel, it must be kept in mind that it is the policy of our law to attempt in every way possible to protect minor children. Fedor v. Manwehn Council, 21 Conn. Supp. 38,41 (1958). It thus falls upon the State of Connecticut, including the Appellee-Norton, to carry out such a policy in the instant action under the doctrine parens patriae. See, e.g. Goskarian's Appeal, 110 Conn. 463,468 (1930).

6. In many cases where the rights of a child are snuffed out, the rights of the State are likewise snuffed out. Much of this was discussed in the Appellee's brief.

(D. Conn. 1973). A brief summary of this concern by the District will demonstrate why the District Court felt compelled to reach and decide the merits of the constitutional issues.

The District Court discussed in some detail the essential right of all children to receive support from their fathers. Doe v. Norton, supra, 365 F. Supp. 65 at 79-80 and n. 25. The District Court in Doe v. Norton, supra, 356 F.Supp. 202 at 206 pointed out that if the paternity of an illegitimate child is not established, such child is "subjected to the additional risk that he will be forever deprived of many rights he is qualified to receive, even though an illegitimate child of his father."[7] The District Court in Doe v. Norton, Id., then pointed out what those rights of the illegitimate child are quoted in the margin.[8] The District Court, Id. at n. 6, noted that "history

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7. Many of these rights reach a constitutional level or the level of a federal protected right. E.G., Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1971); Levy v. Louisiana, 391 U.S. 68 (1967); Gomez v. Perez, 409 U.S. 535 (1973).

8. ". . . the trend of the law is to separate the label 'illegitimate' from the word 'child' to prevent their exclusion from benefits to children. E. g., Weber v. Aetna Cas. & Sur. Co., 506 U.S. 164, 92 S.Ct. 1400, 31 L.Ed.2d 768 (1971) (workmen's compensation benefits); Glona v. American Guarantee & Liab. Ins. Co., 391 U.S. 73,88 S.Ct. 1515, 20 L.Ed.2d 441 (1968) (wrongful death statute); Levy v. Louisiana, 391 U.S. 68,88 S.Ct. 1509, 20 L.ed.2d 436 (1968) (wrongful death statute); Davis v. Richardson, 342 F.Supp. 588 (D. Conn) (3-Judge District

and literature are replete with examples of anguish suffered by illegitimate children denied the satisfaction of knowing their paternity." The District Court was quite concerned with the latter point and found out that the scope of the statute at issue was intended not only to protect the state's coffers, but also to establish the paternity of all illegitimate children so that they might enjoy the long term psychological advantages as well as economic advantages. Doe v. Norton, supra, 365 F.Supp. at 73 n. 10.

In discussing the balance of hardships in reference to whether a preliminary injunction should issue, the District Court in Doe v. Norton, supra, 356 F.Supp. 202, considered the

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Court), aff'd, 409 U.S. 1069, 93 S.Ct. 678, 34 L.Ed.2d 659 (1972) (social security death benefits); Ballentine v. De Sylva, 226 F.2d 623 (9th Cir. 1955) (copyright statute); Middletown v. Luchenbach S.S. Co., 70 F.2d 326 (2d Cir.), cert. denied, 293 U.S. 577,55 S.Ct. 89, 79 L.Ed. 674 (1934) (death on the high seas, "children" includes illegitimates); Turner v. Metropolitan Life Ins. Co., 56 Cal.App.2d 862, 133 P.2d 859 (1943) ("children" in life insurance policy includes illegitimate children). In all of the foregoing cases the interest of the father was only tangential to that of his illegitimate child, for the benefit to the child was not at the expense of his father. But in Gomez v. Perez, 409 U.S. 535, 93 S.Ct. 872, 35 L.Ed.2d 56 (1973), where the same interest of the father as in these cases was at stake, the Supreme Court held that it was a denial of equal protection for a state to exclude illegitimate children from the obligation of a father to support his children."

time factor which is crucial for the children. In this connection, the District Court stated the following:

> "But if the family is to be taken into account, and it must be, hardship to the child cannot be left out of consideration.
>
> As noted above, these children stand to reap significant benefits if paternity is established.
>
> When the effect of the continued denial of the right to substantial benefits accorded to children generally is balanced against the effect which disclosure of the name of a child's father will have on any future relationships with him, the hardships fall more heavily on the child than on his mother.
>
> Another factor militating against the grant of a preliminary injunction is the presence of a statute of limitations which provides that a paternity suit must be brought within three years from the date of the child's birth. Once the third birthday of a child has passed without action, the name of his father may never be disclosed to him. Even if it is disclosed thereafter, years may go by before there is an opportunity to make a claim to a benefit derived through his father, and the more stale such a claim is the more difficult it will be to prove it. The problems with respect to proof of paternity are formidable in any case.
>
> For the foregoing reasons, the application for a preliminary injunction is denied. However, the court, as soon as it is designated will expedite a hearing on the merits." Id. at 207. Footnote omitted.

The rights and benefits of which the illegitimate child derive through his father, discussed in Doe v. Norton, supra, 356 F.Supp. 202, remained significant factors to the District Court in Doe v. Norton, supra, 365 F. Supp. 65, throughout its

entire consideration of the Appellant's statutory and constitutional claims. In addition, when the District Court certified the class action, Doe v. Norton, supra, 365 Supp. at 69, the class of unnamed illegitimate children described in the certification acquired a legal status separate from the interest asserted by the named-Appellants. Sosna v. State of Iowa, 43 U.S.L.W. 4125,4127 (1975). Thus, the rights and benefits of which the illegitimate children in the class derive through their fathers took on an added significance to the District Court in deciding the merits of the instant action.

In examining the District Court's ruling on the application for a preliminary injunction and its memorandum of decision, it is all too apparent that the District Court was not only concerned with the rights of and benefits to any member in the class of children in the instant action, but also with the time factor running against such rights and benefits. The practical demands of time may prove fatal to the rights of and benefits to any member in this class of children. In any event, the passage of time only serves to increase the risk of loss to the rights and benefits to any member child of the class.[9]

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9. Although this discussion on this point is expressed in terms of what might possibily happen to any child as a member of the class, based on our own daily experience we cannot say that such possible happening is hypothetical. It is the Appellee's position that all such children are suffering the loss of rights and benefits in some form or another.

Considering the time factor problem with which the illegitimatechild in the instant action is faced with, his plight may be summarized as follows: with the passage of time the illegitimate child as a member of the class in the instant action has nothing to gain and everything to lose. For example, if one or both parents of an illegitimate child becomes deceased before the identity of the child's father is disclosed, or if the statute of limitations or anything else makes the establishing of paternity impossible or difficult because of a failure to disclose the father's identity, many of the economic rights of which the child qualifies for through his father may be forever cut off. More important, the satisfaction of knowing who his father was may also be forever cut off from the illegitimate child. Even if the illegitimate child is lucky enough to eventually obtain one or more of his rights and benefits in such a situation, they will no doubt be obtained only after substantial and aggravating delay. This is the type of injury which is being experienced at this very moment by the illegitimate child in the instant action. As such, it cannot be stressed enough what was noted by Judge Blumenfeld that even if the identity of the illegitimate child's father is somehow disclosed after the running of the statute of limitations, "years may go by before there is an opportunity to make a claim to a benefit derived through his father, and the more stale such a claim is the more

difficult it will be to prove it. The problems with respect to proof of paternity are formidable in any case." 365 /F. Supp. 207.

The problem, as outlined above, amounts to an exposure of harm to the illegitimate child, i.e., the injury already suffered by the illegitimate child and the continuation of the risk of injury to such child, which is great at the very moment. The coming of tomorrow will not lessen such harm. Future litigation, whether in this or any other action, involving the injury suffered and the injury to be suffered by the illegitimate child with respect to his rights and benefits will give no assurance of an adequate remedy at law.

In connection with the non-existence of an adequate remedy at law, we should note that the needs and wants of the illegitimate child, as with any child, cannot be placed on the same plain with the needs and wants of the adult who can fend for himself. In legal matters, we expect the adult to hold in abeyance his needs and wants by absorbing temporarily the deprivation of those needs and wants until they can be secured through a future legal course of action, such as litigation which often involves substantial periods of time. This future legal course of action is usually on a "maybe" basis as the

adult is never absolutely sure he can make his claim good. But at every step of the way, the adult is able to move swiftly and exercise his discretion in all legal matters. On the other hand, the illegitimate child is under many disabilities in legal matters, as with all children, including the inability to exercise his discretion. In addition, the illegitimate child's needs and wants, as with the needs and wants of all children, are always both great and immediate. Being under the age of discretion, food, shelter, clothing, and the like for any child must always be provided now and cannot be delayed, especially delayed indefinitely. In this context, we cannot expect any child to hold his needs and wants in abeyance by absorbing temporarily the deprivation of those needs and wants while he attempts to secure his rights therein through some future legal course of action. Even after successful litigation, a retroactive lump sum payment of an economic benefit to an illegitimate child does not equate itself with the child's needs and wants which existed at a prior time. In such a situation, the child will have suffered because of his inability to use discretion which is not true with an adult.

The problem as outlined above reduces itself as a quagmire for the class of children in the instant action. The time factor has run and will continue to run against the rights and benefits of any illegitimate child in the class. Every member

of the class of illegitimate children has already lost some rights and benefits because of the delay of litigation. If some of the children have not already forever lost certain rights and benefits, there will no doubt be children who will forever lose certain rights and benefits because of the delay occasioned by the remanding of the instant action to the District Court without this Court reaching and deciding the merits of the constitutional issues. As regards those rights and benefits which have not already been lost, the chances of obtaining these rights and benefits by the illegitimate children decrease daily, especially if this Court declines to reach and decide the constitutional issues. This then constitutes the irreparable injury exposed to each illegitimate child in the class, which injury is both great and immediate. Any remedy at law open to the illegitimate children gives no assurance that any rights and benefits of the illegitimate children will not be lost to one or more of the illegitimate children in the class.

Where the illegitimate child loses his rights and benefits through the non-disclosure of the identity of his father, the State is blocked in its efforts to gain the same or similar rights and benefits on behalf of the illegitimate child and/or on behalf of the State. Perhaps the clearest example of this is where the State attempts to collect support from a father of an illegitimate child. If the illegitimate child is deprived forever

from knowing the name of his father, the State suffers no less of an irreparable injury.

No doubt the District Court reconciled its action with the principles in Younger by recognizing the extraordinary circumstances of the class of illegitimate children as discussed above and then took the most favorable action with respect to the class of illegitimate children, i.e., it decided the merits of the constitutional issues with dispatched thereby minimizing further harm to the children. In considering the dissipation of the rights and benefits of the class of illegitimate children, the District Court was confronted with the reasonable likelihood that the dissipation would become substantially worse with the passage of time. Under the circumstances, the District Court further recognized that there was no adequate remedy at law for the class of children.[10]

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10. This is so in the sense that the Appellants would have to plead their constitutional claims in the Connecticut Circuit Court, which they failed to do, and start at the beginning. From that point on, the litigation of the constitutional issues in the state courts would have to run its course as in any state judicial system before coming to this Court. On the other hand, the instant action in the District Court was ready for immediate trial with a direct review by this Court. In this way, the interest of the class of illegitimate children were being served by keeping further delay by litigation at a minimum. In addition, the District Court must have been aware that if the merits of the issues in the instant action were decided in favor of the Appellee, the plight of the children would not end there; many of the children would be forced to further litigate their claims derived through their father. Time was of essence to the this class of children.

The instant action before this Court is in a worse posture then when it was before the District Court. If this Court declines to reach and decide the merits of the constitutional issues, the delay occasioned by a remand on this basis to the District Court can only aid in further dissipating the rights and benefits of the class of illegitimate children as well as the rights and benefits of the State of Connecticut. At the same time, the mothers of the class of illegitimate children will have, in substance, achieve their goal of non-disclosure at the expense of the rights and benefits of their children.

II. ADDITIONAL CONSIDERATIONS MILITATING AGAINST ABSTENTION.

A. Inherent delay in the abstention process:

This Court has pointed out that because delay is inherent in the abstention process and because there is a danger that valuable federal rights might be lost without the expeditious adjudication in the federal court, abstention is to be invoked only in special circumstances, Harris County Comm'rs. Court v. Moore, 43 U.S.L.W. 4222,4224 (Feb. 18, 1975), "and only upon careful consideration of the facts of each case." Baggett v. Bullitt, 377 U.S. 360,375-379 (1964); Railroad Comm'n. v. Pullman Co., 312 U.S. 496,500 (1941). This would apply all the more so where, as in the instant action, litigation has already been long delayed. Hostetter v. Idlewild Liquor Corp., 377 U.S. 324,329 (1963).

The delay in the abstention process insofar as the instant action is concerned is critical to every illegitimate child in the class.[11.] The magnitude of this problem can be seen by going back before the instant action was instituted in the District Court.[12.] For example, if an illegitimate child or the State seeks disclosure of the identity of the child's father from the child's recalcitrant mother under 52-440b in order to obtain support for the child, where the time left under the statute of limitations pertaining to paternity is comparatively short, the delay in litigating the constitutional issues in the State courts will be considerably longer than in the federal court.[13.] It is the same with any other right and benefit of the illegitimate child which he seeks through the identity of his father.[14.]

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11. We have noted before in this brief that some of the rights and benefits of the illegitimate child reach constitutional levels or fall within federal protected rights. Note 7 supra.

12. This should also be apparent from our discussion on the illegitimate child's rights and benefits under Part II of this brief.

13. It should be kept in mind that there is at least one additional court level in the process of review in the Connecticut state court system before the federal constitutional issues can come before this Court through such a system. Of course, there may be other reasons for delay, not necessarily unjustified, in the state judicial review system. Thus, we may say that generally delay in litigation of federal constitutional issues is longer in the state judicial system, but not necessarily in a particular case.

B. No unsettled question of state law:

It is not an automatic rule that the abstention doctrine is to be applied when a federal court is faced with a doubtful issue of state law. Baggett v. Bullitt, supra at 375 and n.11. The "special circumstances" discussed in Harris County Comm'rs. Court v. Moore, supra, must exist and ascertainment of whether the special circumstances exist must be made on a case by case basis. Id. This applies to the Pullman abstention doctrine, Railroad Comm'n. v. Pullman Co., supra., wherein federal courts should decline to grant relief when a federal constitutional claim is based on an unsettled question of state law in order to allow the state courts the opportunity to pass on the unsettled question of state law thereby avoiding the possibility of unnecessarily deciding a constitutional question. Various applications invoking this doctrine have been noted by this Court and set forth as a guide. E.g. Askew v. Hargrave, 401 U.S. 476 (1971) (a state court action pending which may likely resolve the state law question underlying the federal constitutional claim); Reetz v. Bozanich, 397 U.S. 82 (1970) (matters peculiarly within the province of the local courts concerned with the state law question which in turn affect the federal constitutional claim).

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14 It also should be kept in mind that by instituting proceedings under Section 52-440b, the statutes of limitations pertaining to paternity actions is not tolled. Consequently, the illegitimate child and the State is under constant pressure to secure the rights and benefits of the illegitimate child as quickly as possible after the birth of the child.

It has been pointed out that the statute at issue would be comprehensive only if all illegitimate children whose mothers are not receiving welfare had guardians or guardians ad litem appointed for them. Doe v. Norton, supra, 365 F.Supp. at 85 n.2 (Judge Newman's concurring opinion). Also, there has been discussion that the Connecticut courts might read the statute at issue as requiring the appointment of a guardian ad litem for the child. Supplemental Brief of children of Appellants at 2. These notions are then theorized to somehow constitute an unsettled question of state law. Some observations will be of aid to this Court.

First, there is authority for the appointment of guardians ad litem for minor children [15.] in all proceedings in the Connecticut state courts, except in juvenile court proceedings.[16.] Section 45-54 of the General Statutes of Connecticut, Revision of 1958.

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15. There is no reason to suppose that Connecticut courts would read Section 45-54 as excluding illegitimate children. On this point, no unsettled question of state law exist in the concrete sense.

16. In juvenile court proceedings, the child has the right of counsel. Section 17-66b of General Statutes of Connecticut. In addition, there is no authority specifically barring the juvenile court from appointing a guardian ad litem in addition to the child being represented by counsel.

Second, the appointment of guardians ad litem is available to minor children regardless of whether or not their parents receive welfare assistance.[17.] Section 45-54 of the General Statutes of Connecticut. Without some evidence to the contrary, it is unrealistic to conclude that there is an unsettled question of state law existing as to whether the Connecticut courts could or would read Section 45-54 as not including minor children of parents receiving welfare assistance.

Third, whether Section 52-440b requires that guardians ad litem be appointed for children whose mothers are not receiving welfare assistance would not avoid, fundamentally alter, or eliminate the constitutional issues in the instant action. In the case where a guardian, natural or otherwise, request the disclosure of the identity of an illegitimate child's father from the child's recalcitrant mother, the guardian may petition the Connecticut Court of Common Pleas under Section 52-440b. In the case where no guardian exists, any interested person may petition the Connecticut Courts under Section 45-54 and Section 52-440b for the appointment of a guardian ad litem for the purposes of seeking the disclosure. See also Clark v. Green, 29 Conn. Su

17. Indeed, this counsel has obtained guardians ad litem in divorce matters for minor children of mothers receiving welfare assistance and this counsel knows of no authority which would have barred such action at that time.

438 (1971); McCarrick v. Kelly, 70 Conn. 642,646 (1898). This may be done by such interested person as next best friend of the child.[18.]

In the case where the interested person petitions the court for an appointment of a guardian ad litem for the purposes of seeking disclosure, if the request for the appointment of a guardian ad litem is refused, it is grounds for error and subject to appellate review. See Harris v. Rosenberg, 43 Conn. 227, 231 (1875). Just because there may be a failure to request disclosure under Section 52-440b in a particular case by a guardian or next best friend would not cause Section 52-440b to be interpreted as creating a class of mothers not included in and/or barred from the operation of Section 52-440b or cause Section 52-440b to be interpreted as violating some constitutional provision.[19.]

There is no uncertainty as to Section 52-440b applying to

18. "But it is not necessary that the prochein ami should have received authority from the infant, to enable him to sue in her name. The law which permits her to sue and appear only by her guardian or next friend, regards her at all times during her infancy as without sufficient knowledge and experience to properly decide when or how an action should be prosecuted for her benefit. 'The law knows no distinction between infants of tender and of mature years; and as no special authority to sue is requisite in the case of an infant just born, so none is requisite from an infant on the very eve of his attaining his majority.' Morgan v. Thorne, 7 M. & W. *400. *408. The prochein ami is regarded as an officer of the court by which, by statute in England, he was originally appointed. It is his duty to care for the interests of the infant in the institution and conduct of suits for his benefit, his power and responsibility in the performance of that duty being similar to that of guardians. Under our practice no previous appointment by the court is required, and the prochein ami named in the writ is permitted to appear and prosecute in the infant's name, though if he

illegitimate children of mothers not receiving welfare assistance because plainly the appointment of guardians ad litem is applicable to such children under Section 45-54 as it would be to illegitimate children of mothers who receive welfare assistance. Thus, question is not whether the guardians ad litem provision under Section 45-54 applies to illegitimate children of mothers not receiving welfare assistance, but whether in a particular case falling within Section 52-440b a guardian ad litem will be in fact appointed by a Connecticut Court for an illegitimate child whose mother is not receiving welfare assistance. This question is a matter within the discretion of the Connecticut State Courts, which discretion is always subject to judicial review. Judge Newman's contention, therefore, amounts to no more than an

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is not a proper person or fails to properly discharge his duties, the court may remove him and appoint another person in his place." McCarrick v. Kealy, 70 Conn. 642,646 (1898).

19. No legislature and no court has the right to blindly require the appointment of guardians ad litem for illegitimate children born in the state. Some rational procedure must exist to make the appointment of a guardian ad litem only where needed. No system can guarantee faultless operation. For example, if the State required appointment of guardians ad litem at birth for all illegitimate children of recalcitrant mothers, could not such mothers falsify the father's name causing the problem to go undetected and achieving their goal of non-disclosure? An oath provision would have its constitutional problems and certainly not guarantee a better system than provided by judicial supervision.

uncertainty about the appointment of a guardian ad litem in a particular case for an illegitimate child whose mother is not receiving welfare assistance; it is not the sort of uncertainty or vagueness that "leaves those subject to the statute uncertain about what is required of them."[20] Harris County Comm'rs. Court v. Moore, supra at 4225 n.9. Where this "applicability of the statute is uncertain, abstention is often proper. . . ." Id. Where, on the other hand, the uncertainty or vagueness claim goes to the obligations imposed by the statute, abstention is not proper "since a single state construction often would not bring the challenged statute 'within the bounds of permissible constitutional certainty.' Baggett v. Bullitt, 377 U.S. 360, 377-378 (1964); Proceunier v. Martinez, 416 U.S. 396,401 n.5 (1974)." Id.

In the instant action, the construction by a single state court of whether guardians ad litem are required under Section 52-440b for children whose mothers are not receiving welfare assistance would not eliminate the Appellants' constitutional claims with respect to the first, third, fourth, fifth, eighth, ninth, and fourteenth amendments. The Appellants' equal protection claim would not be eliminated since their equal protection

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20. It would appear that Judge Blumenfeld and Judge Timbers in the District Court and the Appellee found no problem with respect to guardians ad litem situation.

claim is based on a classification consisting of all illegitimate children and their mothers.[21]. Appellants' Brief at 25-28.

Even if the Appellants' equal protection claim was based on a classification of A.F.D.C. assistance mothers with illegitimate children as opposed to non-A.F.D.C. assistance mothers with illegitimate children, a state court construction of 52-440b requiring appointment of guardians ad litem for all illegitimate children of non-A.F.D.C. assistance mothers would resolve nothing. A.F.D.C. assistance mothers and non-A.F.D.C. assistance mothers with illegitimate children would both be subject to Section 52-440b before such a construction as well as after. Doe v. Norton, supra, 365 F.Supp. at 81. In reality, the contention of the A.F.D.C. assistance mothers that "because of the division of authority among different persons to initiate proceedings under the statutes proprotionately fewer such proceedings would be brought by guardians or guardians ad litem than by the commissioner" would remain the same. Id.

As discussed above, the statute at issue contains no uncertainty or ambiguity. Where this is the case, federal courts should not abstain but should proceed to determine the federal constitutional issues. Wisconsin v. Constantineau, 400 U.S. 433,439 (1970).

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21. This would hold true under the District Court's certification of the classes consisting of: (1) those mothers receiving A.F.D.C. assistance who refuse to comply with Section 52-440b; and (2) the illegitimate children of those mothers.

Before concluding this argument as to guardians ad litem, other observations shed light on the guardian ad litem problem.

As with the prochein ami, the guardian ad litem appointed in a particular case is subject to the control of the court. Section 45-54 of the General Statutes of Connecticut. Whether anything is in the best interest of any child still remains within the discretion of the Court, subject to judicial review.

Counsel for the Appellants' children states that the "mothers of children who have just left the welfare rolls may not be proceeded against by the Welfare Commissioner (under Section 52-440b) although the children's fathers are liable to the State for past support and lying-in expenses." Supplemental Brief of Children of Appellants at 5. In Connecticut, the child who received welfare assistance remains liable to repay the State the amount of assistance paid to such child, as well as his father. Thibeault v. White, State Welfare Commissioner, et al, 36 Conn. L.J. No. 37, page 12 (March 11, 1975). In a case where a mother and her illegitimate child go off the welfare rolls, there is nothing under Section 52-440b which prevents the State of Connecticut from seeking the appointment of a guardian ad litem. In this way, the guardian ad litem in turn may seek the identity of the child's father in an attempt to obtain reimbursement from the child's father for the welfare debt owed

to the State by the child. Without evidence to the contrary, this would serve in the interest of the child.

It should be noted that the statement made by counsel for the Appellants' children that "[w]here children have an interest in proceedings in probate court or judvenile court, a guardian must be appointed to protect their interest" is not accurate. In such proceedings, the appointment of a guardian ad litem falls within the discretion of the Court. Section 45-54 of the General Statutes of Connecticut; Rules for the Juvenile Court, Connecticut Practice Book (1963), Section 1122 (effective July 1, 1974).

We believe that there are other facts in addition to those already discussed above which compel that this case be not remanded without deciding the merits of the constitutional issues. The application of Connecticut's statute of limitations as regards paternity matters can cause problems to the Appellee if there is further delay in deciding the merits of the instant action.

Section 52-435a of the Connecticut General Statutes reads in part as follows:

> "***No such petition shall be brought after three years from the birth of such child, or after three years from cessation of contribution toward support of the child by the putative father whichever is later, provided the provisions of section 52-590 shall be applicable to this section. ***"

Section 52-590 reads as follows:

> "In computing the time limited in the period of limitation prescribed under any provision of chapter 925 or this chapter, or section 52-435a, the time during which the party, against whom there may be any such cause of action, is without this state shall be excluded from the computation, except that the time so excluded shall not exceed seven years."

When reading the above two cited statutes in connection with the specific statute in question, namely Section 52-440b, it is easily apparent that until the unwed mother discloses the name of the putative father, the state welfare commissioner is uncertain as to whether a three year statute or a seven year statute of limitations applies to the particular case. Thus, there are compelling reasons why the commissioner is concerned with the name of the putative father even though the child has already reached his third birthday.

There is another reason for the compelling of the name of the putative father inasmuch as under Connecticut practice, a

a statute of limitations must be specially pleaded.[22]. There is no reason why the welfare commissioner should anticipate just what defenses the alleged putative father will choose to make. Only the defenfant putative father can decide just what defenses he will choose to invoke.

In addition to the three year and the seven year statute of limitations, there is a one year statute of limitations which begins after judgment in an action for dissolution of marriage when a child born during marriage has been determined not to be the legitimate issue of such marriage. Section 46-26b(b) of the General Statutes of Connecticut, Revision of 1958. Thus, the child, for example might have reached his fifthteenth birthday and the welfare commissioner may still have a compelling reason to learn the name of the putative father.

Assuming for the moment that a particular putative father has an absolute defense to a bastardly action because the statute of limitations has passed, there still would be compelling reasons why the welfare commissioner would want the name of the putative father. While the latter might not want to support the illegitimate child directly by reimbursing the state welfare department, he may well agree to acknowledge that he is the father of the child which could satisfy the requirement of

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22.
Connecticut Practice Book of 1963 as Amended, Section 120 --- Denials; Special Defenses
"No facts may be proved under either a general or special denial except such as show that the plaintiff's statements of fact are untrue. Facts which are consistent with such statements but show, notwithstanding, that he has no cause of

dependent's benefits under the Veterans Administration and/or the Social Security Administration.

As indicated before, the concern for the class of children certified in this case is a compelling reason for this Court to decide the constitutional issues raised by the parties.

Although the Appellee urges this Court to decide the merits of the instant action, the Appellee wishes to state that he disagrees with the statements, arguments, and conclusions stated by the children's counsel, especially in Part II consisting of Sections A-D, in the supplemental brief submitted by the children's counsel. Our reasons for such disagreement were covered in the Appellee's main brief. However, the Appellee does point out that no motion to dismiss based on abstention was filed in the District Court. The Appellee further points out that in civil contempts, the right of complete judicial review is provided for by the Connecticut judicial system. Conn. Public Act No. 74-183, Section 9 (1974).

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action, must be specially alleged. Thus, accord and satisfaction, arbitration and award, coverture, duress, fraud, illegality not apparent on the face of the pleadings, infancy, that the defendant was non compos mentis, payment (even though nonpayment is alleged by the plaintiff), release, the statute of limitations and res adjudicata must be specially pleaded, while advantage may be taken, under a simple denial, of such matters as the statute of frauds, or title in a third person to what the plaintiff sues upon or alleges to be his own."

CONCLUSION

Based on the foregoing reasons, the Appellee urges this Court to decide the merits in the instant action.

Respectfully submitted,

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This is to certify that a copy of the foregoing Supplemental Brief was mailed First Class Mail, Postage Prepaid, by depositing same in a United States Mail Box on March 14, 1975, to each of the following:

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